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In the matter of **1998 and 1999** **Cable Royalty** **Distribution Proceedings**	**Docket No. 2001-8 CARP CD 1998-99**

THE CANADIAN CLAIMANTS GROUP'S

PETITION TO MODIFY

THE REPORT OF THE COPYRIGHT ARBITRATION ROYALTY PANEL

Dated: November 4, 2003

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Pursuant to 37 C.F.R. § 251.55(a), the Canadian Claimants Group ("CCG") hereby submits its Petition to Modify the October 21, 2003 Report of the Copyright Arbitration Royalty Panel ("Panel") to the Librarian of Congress (the "Report"). Specifically, the CCG requests that the Report be modified so that the award to the Public Television Claimants ("PTV") is not treated as "net" relative to the CCG's award. Unless so modified, the Panel's combination of awards would result in an improper reduction in the CCG's award of Basic Fund Royalties.

I. INTRODUCTION

The Panel's Report is admirable in its acknowledgment of a problem that has long plagued these distribution proceedings: There is no one methodology for determining relative value that can be applied with equal validity and accuracy to all claimant groups. In this proceeding in particular, the evidence presented by the claimant groups varied dramatically, both in terms of the type of evidence and its reliability and accuracy as applied to different claimant groups. Accordingly, the Panel used what it determined to be the best evidence of relative value for each party even if it meant using different methodologies. As a result of that process, the Panel awarded three parties their 1998-1999 Bortz valuations. Of the remaining awards, one was based on a fees generated ("fee gen") approach, one was based on a lack of changed circumstances for relative valuation, one was based on an "off the top" share of all programming, and one was based on a settlement.

The Panel's process for combining these various awards is carefully explained in the Report's Appendix B, entitled "The Calculations." The instant Petition to Modify focuses on a series of calculations within Appendix B.[1] Specifically, the CCG believes that the Panel erred when it treated the award to PTV as "net" relative to the CCG's award, thereby deducting a *pro rata* share of the PTV's full award from the CCG's Basic Fund award.[2] As explained below, this combination process has a disproportionately harmful effect on the CCG. Moreover, while the harmful effect may seem minor in the context of

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1 The CCG also disagrees with two factual determinations of the Panel, but does not seek to overturn those findings in this petition. First, the CCG disagrees with the Panel's decision not to use the Canadian Content Analysis data to award the CCG the requested 70.51% of the fees paid for Canadian distant signals. (*See* CCG Proposed Findings of Fact and Conclusions of Law ("Proposed Findings") at p. 56; Report at pp. 71-73.) Second, the CCG disagrees with the Panel's decision to award Music Claimants more than 2.33% of the royalties "off the top." (*See* CCG Proposed Findings at ¶¶ 114-17; Report at p. 89.) The CCG does not waive its position on these findings but acknowledges that these issues will require further factual substantiation in future proceedings.

2 This issue does not affect the CCG's share of the 3.75% royalties.

the entire royalty fund, to a small claimant group like the CCG, losing part of its Basic Fund award due to a computational side-effect is substantial and affects its financial ability to participate in these proceedings.[3]

Finally, it should be clarified that the CCG is not requesting a modification of the PTV award, nor advocating the application of the fee gen method to PTV. Rather, CCG is only seeking the correction necessary to ensure that its award is not improperly and disproportionately reduced by PTV's award.

II. DISCUSSION

A. The CCG Should Receive a Fee Gen-Based Award Reduced Only For "Net" Awards to Music, the Devotional Claimants, and NPR

The CCG believes that the Panel erred in the manner in which it incorporated the CCG award into the total pool, and seeks to modify the Panel's Report so that the CCG award is reduced only for "net" awards to Music, the Devotional Claimants, and NPR.

In its Proposed Findings of Fact and Conclusions of Law ("Proposed Findings"), the CCG sought a share of the fees paid by cable systems for carriage of distant Canadian signals. The CCG presented data showing how those fees should be divided among those claimant groups that provide programming on the Canadian signals (*i.e.*, the CCG, Joint Sports Claimants and Program Suppliers). The CCG argued, and the Panel agreed, that there is no other reliable evidence of the value of Canadian programming and that the fees

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3 Certainly, there is precedent for the Librarian making small mathematical adjustments. For instance, in the last cable royalty distribution proceeding, the Librarian granted Joint Sports Claimants' request, on petition to modify, for an adjustment of the CCG's 3.75% Rate Fund award, splitting the 0.35% awarded to the CCG among three parties. <u>Distribution of 1990, 1991 and 1992 Cable Royalties</u>, 61 Fed. Reg. 55653, 55663 (Oct. 28, 1996).

generated approach is the best approach for determining the Canadian award. (Report at 72.) Though the CCG proposed a combination of valuation data, the Panel chose to award the CCG a share of the fees paid for Canadian distant signals based only on the results of the Canadian survey sponsored by Dr. Debra Ringold. (Report at 73.) Using the royalty data and the Canadian survey results, the Panel determined the CCG's initial relative valuation as follows:

Table 1
Initial Relative Valuation of CCG Share by Panel

	1998	**1999**
Basic Royalties paid for Canadian distant signals as a percentage of Basic fees paid for all distant signals	3.31027%	3.64297%
Canadian share according to Canadian Survey	59.17%	58.20%
Adjustment factor to allocate survey results "allocated to other programming"[4]	1.0087762	1.0084712
Resulting CCG award	1.97588%	2.13817%

(*See* Report at 73.)

The Panel made similar calculations for the programming of Program Suppliers ("PS") and the Joint Sports Claimants ("JSC") that was shown on retransmitted Canadian signals so that the sum of the shares for the three groups equaled the share of royalties paid for Canadian distant signals. The instant petition does not challenge the Panel's calculations or award up to this point (subject to the CCG's right to further develop the

[4] The Panel's allocation of the share of "other programming" to JSC, PS, and the CCG is consistent with the historical handling of unallocated fees. See 1978 Proceeding, 45 Fed. Reg. at 63042.

factual record in future proceedings; *see* fn. 1, *supra*). Rather, the CCG believes that the Panel erred in the manner in which it combined the CCG award into the total pool.[5]

B. The Panel Incorrectly Reduced the CCG's Award by the "Net" Awards for PTV, Music and the Devotional Claimants

In the process of combining the claimant awards, the Panel incorporated the CCG's award into the "100% Universe" that the Panel had created for PS, JSC and the National Association of Broadcasters ("NAB"). The Panel's approach was to reduce the "100% Universe" by the percentage of Basic Fund royalties paid for the Canadian *signals* and then add back to the "100% Universe" the share of Canadian signal royalties allocable to the CCG, PS and JSC. (Report, App. B at 6.) The Panel thus had numbers for the CCG, PS, JSC and NAB but still needed to factor in its "net" awards for the Devotional Claimants, Music and PTV.[6]

To achieve this, the Panel deducted the sum of its "net" awards to PTV, Music and the Devotional Claimants, 10.685%, from the awards allocable to CCG, PS, JSC and NAB. As a result of this reduction, the sum of the awards for the seven parties equaled 100%. The effect of this reduction on the CCG award is shown below:

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5 Because the CCG could not anticipate that the Panel would treat the award to PTV as a "net" award, neither the CCG's Proposed Findings nor its Reply Findings of Fact and Conclusion of Law address this issue.

6 The Panel's awards did not include a calculation to reduce each award for the parties' settlement with NPR. Rather, the Panel simply noted that NPR was entitled to 0.18% of the total funds for 1998 and 1999. (Report at 92-93.)

Table 2 Panel's Reduction of Initial Canadian Basic Fund Award to Incorporate All Other Awards		
	1998	**1999**
Canadian Share	1.97588%	2.13817%
Sum of "Net" Awards to PTV, Music and Devotional Claimants	10.685%	10.685%
Final Canadian Award	1.76476%	1.90971%

(*See* Report, Appendix B, at 8-9.)

Although it is not obvious from Table 2, the Panel's reduction results in disparate treatment of the CCG because: (1) the combination process is inconsistent with the fee gen award, and (2) the "100% Universe" of PS, JSC, and NAB is mathematically inflated before the CCG is added. This mathematical process unfairly harms the CCG but does not harm PS, JSC, or NAB.

First, the combination process, particularly with regard to the PTV allocation, is inconsistent with the Panel's fee gen approach. The Panel's award to the CCG was expressly based on a fee gen concept. (Report at 72.) Thus, the CCG is limited to a share of the royalties paid for its signals. Those royalties were split among the three parties that provided programming on the Canadian signals: the CCG, JSC and PS. The CCG's share was then reduced for Music, Devotional Claimants and PTV. The Music allocation is appropriate: music is a component of all programming, and the Music allocation properly reflects Music's 4.00% share. Similarly, the allocation to the Devotional Claimants is pursuant to an express settlement, and therefore proper. However, the allocation to PTV is incorrect. Public Television programming does not appear on Canadian distant signals as either a programming category, such as CCG, JSC or PS programming, or a component, such as Music. Nor did the CCG settle with PTV. Thus, allocating 5.49125% of the Canadian fees to PTV is fundamentally inconsistent with the fee gen approach.

Second, the effect of the adjustment for the "net" awards is not the same for the CCG as it is for PS, JSC and NAB. Prior to adjusting for the "net" awards, the Panel determined awards for PS, JSC and NAB by relying on the Bortz study results for these three parties. Because the Bortz study also includes data for the CCG, Public Television and Devotional claimants, the awards for PS, JSC and NAB do not total to 100%. Rather, their Bortz awards summed to 91.5% in 1998 and 91.2% in 1999. The Panel, therefore, endeavored to create a "100% Universe" by taking the Bortz awards for the three groups and scaling them up pro rata so that the three awards totaled 100%. (Report, App. B. at 2.) As shown in Table 3, below, the three groups got an initial increase totaling more than 9% before they and the Canadians were collectively reduced by 10.685%. By comparison, the Canadians did not receive a similar statistical upward adjustment.

Table 3
Creation of Initial 100% Universe
(before addition of Canadian signal value)

	1998		**1999**	
	Relative Valuation	**After Adjustment to Create 100% Universe**	**Relative Valuation**	**After Adjustment to Create 100% Universe**
PS	39.7%	43.38798%	37.7%	41.33772%
JSC	37.0%	40.43716%	38.9%	42.65351%
NAB	14.8%	16.17486%	14.6%	16.00877%
Totals	91.5%	100.0%	91.2%	100.0%

(*See* Report, App. B. at 2-3.)

Also, implicit in the Panel's approach was that the 100% Universe was an initial allocation of the fees paid for U.S commercial and educational signals. When the CCG was included, the 100% Universe included fees paid for all signal types. When PTV was added, the reduction in the awards to PS, NAB and JSC was tempered by the presence of the fees paid for educational signals. The CCG, whose percentage was limited to the percentage of fees paid only for Canadian distant signals, did not receive any benefit from the presence of fees paid for educational signals.

The effect of the Panel's approach is that the CCG gives up more of its initial award towards the "net" claimants than does NAB, PS, or JSC, even though—based on the rational behind the fee gen approach—the CCG should give up none of its award to PTV. The following table shows the effective reduction in the 1998 awards for PS, JSC and NAB from their initial relative valuation awards that were based on the Bortz study. (The results are consistent with regard to the 1999 award reductions.)

Table 4
Effect of Panel's Reduction of PS, JSC and NAB Shares for "Net" Awards

	Relative Value (Original Bortz Share plus Allocation from Canadian Signal)	Panel's 1998 Award	Effective Reduction Due to Music, PTV and Devotionals
PS	40.07167%	37.80114%	5.7%
JSC	37.96273%	35.78076%	5.7%
NAB	14.8%	13.96836%	5.6%

In contrast, the CCG award is effectively reduced by the full 10.685% awarded to PTV, Music and the Devotional Claimants. This is shown below for 1998:

Table 5 Effect of Panel's Reduction of CCG Share for "Net" Awards		
Relative Value (Initial Fee Gen Award)	**Panel's 1998 Award**	**Effective Reduction Due to Music, PTV and Devotionals**
1.97588%	1.76476%	10.685%

C. The Panel Should Have Combined the PS, JSC, NAB, PTV and CCG Awards before Adjusting for Music and the Devotional Settlement

As shown, the Panel's approach treats the CCG disparately by disproportionately reducing the CCG's Basic Fund award. The Panel should have reduced the CCG award for only the Devotional Claimants and Music.

To reach the correct final awards, the Librarian should revise the process used by the Panel in its Calculations. The Panel's Step 1, the initial creation of the "100% Universe," was premature and should be disregarded. The Step 2 calculations are correct. In Step 3, however, the Panel should not have combined the Canadian data with the three adjusted Bortz awards. Instead, the Panel should have adjusted only the three Bortz numbers so that the sum of PS, JSC, NAB and PTV plus the value of the Canadian signal all totaled 100%. This approach takes into account the (1) effect of inflating the Bortz numbers (for the "100% Universe"), (2) the buffer created by the fees paid for educational signals, (3) the difference between fee gen and Bortz methodologies, and (4) the fact that the Panel's award to PTV is based on the 1990-1992 CARP's adjusted Bortz award to

PTV. (Report at 69; Report of Copyright Arbitration Royalty Panel re Cable Royalties for the Years 1990-1992 (May 31, 1996) at 117, 123-124.)

1. Correctly combining the relative valuations for the 1998 Basic Fund Awards

Using the initial values assigned by the Panel for 1998,[7] the proper calculation to combine this data can be expressed in the algebraic manner of the Panel, as follows:

$$
\begin{aligned}
39.7X + 37.0X + 14.8X &= 100 - 5.49125 - 3.31027 \\
91.5X &= 91.19848 \\
X &= 0.996705 \text{ (adjustment factor)}
\end{aligned}
$$

The results (after multiplication by the adjustment factor) are as follows:

PS:	39.56917%
JSC:	36.87807%
NAB:	14.75123%
Canadian signal value:	3.31027%
PTV:	5.49125%
	100.00% (rounded)

The next part of the process, as described by the Panel, is to apportion the Canadian signal value (3.31027%) to the CCG, PS and JSC using the information provided above and the Panel's Step 2 results. The results are as follows:

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7 (*See* Report, App B.)

PS:	39.56917%	+ 0.37167%	= 39.94084%
JSC:	36.87807%	+ 0.96273%	= 37.84080%
NAB:	14.75123%		= 14.75123%
CCG:		+ 1.97588%	= 1.97588%
PTV	5.49125%		= 5.49125%
			100.00%

Finally, the "net" awards to the two remaining claimant groups, Music and the Devotional Claimants, must be incorporated. This step is analogous to the Panel's Step 4. In contrast to the Panel's calculations at Step 4, however, the award to PTV has already been factored in at this point. In the following calculations, therefore, the other two "net" claimant awards should not reduce PTV's award. Again, the calculations can be shown in the manner of the Panel's algebraic expression, as follows:

$$\begin{aligned} 39.94084X + 37.84080X + 14.75123X + 1.97588X &= 100 - 5.49125 - 4.0 - 1.19375 \\ 94.50875X &= 89.315 \\ X &= 0.945045 \text{ (adjustment factor)} \end{aligned}$$

The final, corrected results (after multiplication by the adjustment factor) for 1998 are as follows:

PS:	37.74588%
JSC:	35.76125%
NAB:	13.94057%
CCG:	1.86730%
PTV:	5.49125%
Music	4.00%
Devotional	1.19375%
	100.00%

2. Correctly combining the relative valuations for the 1999 Basic Fund Awards

The same calculations can be performed to correct the 1999 Basic Fund awards. Using the initial values assigned by the Panel for 1999,[8] the proper calculation to combine this data can be expressed in the algebraic manner of the Panel, as follows:

$$
\begin{aligned}
37.7X + 38.9X + 14.6X &= 100 - 5.49125 - 3.64297 \\
91.2X &= 90.86578 \\
X &= 0.996340 \text{ (adjustment factor)}
\end{aligned}
$$

The results (after multiplication by the adjustment factor) are as follows:

PS:	37.56184%
JSC:	38.75744%
NAB:	14.54650%
Canadian signal value:	3.64297%
PTV:	5.49125%
	100.00%

The next part of the process, as described by the Panel, is to apportion the Canadian signal value (3.64297%) to the CCG, PS and JSC using the information provided above and the Panel's Step 2 results. The results are as follows:

PS:	37.56184%	+ 0.47539%	= 38.03723%
JSC:	38.75744%	+ 1.02941%	= 39.78685%
NAB:	14.54650%		= 14.54650%
CCG:		+ 2.13817%	= 2.13817%
PTV	5.49125%		= 5.49125%
			100.00%

[8] (*See* Report, App B.)

Finally, as in the 1998 calculations, the "net" awards to the two remaining claimant groups, Music and the Devotional Claimants, must be incorporated. This step is analogous to the Panel's Step 4. In contrast to the Panel's calculations at Step 4, however, the award to PTV has already been factored in at this point. In the following calculations, therefore, the other two "net" claimant awards should not reduce PTV's award. Again, the calculations can be shown in the manner of the Panel's algebraic expression, as follows:

$$\begin{aligned}
38.03723X + 39.78685X + 14.54650X + 2.13817X &= 100 - 5.49125 - 4.0 - 1.19375 \\
94.50875X &= 89.315 \\
X &= 0.945045 \text{ (adjustment factor)}
\end{aligned}$$

If done in that manner, the final, corrected results (after multiplication by the adjustment factor) for 1999 are:

PS:	35.94689%
JSC:	37.60036%
NAB:	13.74709%
CCG:	2.02067%
PTV:	5.49125%
Music	4.00%
Devotional	1.19375%
	100.00% (rounded)

3. Comparison of effective reduction for "net" awards

Comparing the final results above to the Panel's initial relative valuation shows that the four relative valuations for PS, JSC, NAB and the CCG can be combined with the "net" awards to PTV, Music and the Devotional claimants in such a way that all four groups bear a very similar share of the "net" awards. As in Tables 4 and 5 above, the comparison below for 1998 illustrates the difference between the initial relative valuation and the corrected final award:

Table 6 Effective Reduction in Awards Using CCG Method for Combining Relative Values			
	Bortz Share plus Allocation from Canadian Signal	**Corrected Award**	**Effective Reduction Due to Music, PTV and Devotionals**
PS	40.07167%	37.74588%	5.8%
JSC	37.96273%	35.76125%	5.8%
NAB	14.80000%	13.14057%	5.8%
CCG	1.97588%	1.867295%	5.5%

(A comparison of the effective reduction due to the adjustment for Music, PTV, and Devotionals would be comparable for 1999.) This table shows that the combination process sought by the CCG properly distributes the impact of the "net" awards among the four parties. Comparing this table to Tables 4 and 5 above shows that the effective reduction of the awards for NAB, PS, JSC and CCG—to account for the "net" awards for PTV, Music and the Devotional Claimants—can be accomplished in a manner that fairly apportions the impact of the reduction among the four parties while remaining consistent with the Panel's initial relative valuations based on Bortz and fee gen data.

III. CONCLUSION

The Panel's initial determination of relative value for the six litigating claimant groups is reasonable given legal precedent and the evidence presented by the parties. The CCG does not seek to change any of the initial relative valuations. Rather, it seeks only to avoid the disparate impact of the Panel's mathematical combination of the initial relative values in the calculations of the final Basic Fund awards. Accordingly, the CCG requests that the Librarian modify the Panel's calculations to achieve the following Basic Fund awards:

Table 7 Final, Corrected Basic Fund Awards		
	1998	**1999**
PS	37.74588%	35.94689%
JSC	35.76125%	37.60036%
NAB	13.94057%	13.74709%
PTV	5.49125%	5.49125%
Music	4.00000%	4.00000%
CCG	1.86729%	2.02067%
Devotionals	1.19375%	1.19375%

The CCG submits that the approach outlined in the instant petition more fairly deals with the combination of different initial valuations based on differing methodologies. The approach presented herein will avoid improper and disparate treatment even if the Librarian chooses to modify the awards of the other parties.

Respectfully submitted,

Dated: November 4, 2003

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CERTIFICATE OF SERVICE

I, Kendall Satterfield, hereby certify that a true and correct copy of the foregoing document were hand-delivered (indicated by asterisk) or sent by Federal Express to those listed below:

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Re: Distribution of 1998-1999 Cable Royalty Funds
Docket No. 2001-8 CARP CD 98-99

Dear Mr. Carson:

Enclosed please find the original and five copies of: The Canadian Claimants Group's Petition to Modify the Report of the Copyright Arbitration Royalty Panel. Also enclosed is an additional copy of the document to be file-stamped and returned by the messenger.

Sincerely,

Kendall Satterfield

L. Kendall Satterfield

Enclosure

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